

IP 06-0083-CR 5 H/F USA v Rubio
Magistrate Kennard P. Foster

Signed on 09/06/06

NOT INTENDED FOR PUBLICATION IN PRINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

USA,)	
)	
Plaintiff,)	
vs.)	
)	
RUBIO, JOSE,)	CAUSE NO. IP06-0083-CR-05-H/F
)	
Defendant.)	

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

THE UNITED STATES OF AMERICA,)	
)	
Plaintiff,)	
)	
v.)	
)	CAUSE NO. IP-06-83-CR-05-H/F
JOSE RUBIO,)	
a/k/a "Miguel," a/k/a "Gordo,")	
)	
Defendant.)	

ENTRY AND ORDER OF DETENTION PENDING TRIAL

SUMMARY

The defendant, Jose Rubio, is charged with one offense in an indictment returned on May 24, 2006, that is, one count of conspiracy to possess with intent to distribute one kilogram or more of heroin, a Schedule I, Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846. Jose Rubio made his initial appearance in the Southern District of Indiana, on August 15, 2006. At the initial appearance, the government moved for detention pursuant to 18 U.S.C. §§ 3142(e), (f)(1)(B), (f)(1)(C), and (f)(2)(A), on the grounds that the defendant is charged with an offense for which the maximum sentence is imprisonment for life; that the maximum sentence is imprisonment of ten years or more prescribed in the Controlled Substances Act; and the defendant is a serious risk of flight if released. The Court then scheduled a pretrial detention hearing for August 22, 2006, as a result of the defendant and the government each

requesting time to prepare for the hearing. At that detention hearing, defense counsel orally moved for a continuance of the detention hearing and the request was granted. The detention hearing was then reset for August 28, 2006. At the detention hearing held as scheduled, the United States appeared by Melanie C. Conour, Assistant United States Attorney. Mr. Jose Rubio appeared in person and by his court-appointed counsel, Kenneth Riggins.

As the defendant, Mr. Rubio, has been indicted, there is probable cause to believe that the defendant committed the crime with which he is charged. The probable cause finding gives rise to the presumptions that there is no condition or combination of conditions which will reasonably assure the appearance of the defendant or the safety of the community. The defendant presented evidence, however, neither presumption was rebutted. It was established by clear and convincing evidence that the defendant is a serious risk of flight and a danger to the community and other persons, and consequently, he was ordered detained.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The defendant, Jose Rubio, is charged by indictment with one count of conspiracy to possess with intent to distribute one kilogram or more of heroin, a Schedule I, Narcotic Controlled Substance, in violation of 21 U.S.C. §§ 841(a)(1) and 846.

2. The statutory penalties for the drug trafficking conspiracy offense charged against the defendant, that is, conspiracy to possess with intent to distribute one kilogram or more of heroin, include a term of imprisonment of not less than ten (10) years imprisonment and up to life imprisonment. 21 U.S.C. §§ 841(b)(1)(A)(vii).

3. The Court takes judicial notice of the indictment submitted in this cause. The Court further incorporates the evidence admitted during the detention hearing, as if set forth here.

4. Based upon the indictment, the Court finds there is probable cause for the offense the defendant is charged with committing and the rebuttable presumptions arise that the defendant is a serious risk of flight and a danger to the community. 18 U.S.C. § 3142(e).

5. The Court considered a Pre-Trial Services Report (PS3) regarding Mr. Rubio, as the Court's Exhibit A, on the issue of release or detention. Mr. Rubio's counsel made a proffer of evidence but offered no testimony or evidence in rebuttal of the presumptions. The Government called a law enforcement officer to testify.

6. The PS3 evidences that the defendant is currently serving a sentence for possession of heroin; the sentence imposed was 20 years, with 16 years suspended and the defendant was residing at a community corrections facility at the time of his arrest on the instant matter. The PS3 further evidences that Mr. Rubio spends the majority of his time in California and has few if any contacts with the Southern District of Indiana, other than the distribution of heroin.

7. Through the law enforcement officer testimony, it was established that Mr. Rubio's role in the charged conspiracy was that of a distributor, with evidence appearing in the form of police surveillance and identification as well as electronic surveillance.

8. The presumption that the defendant is a serious flight risk and a danger to the community and any other person was not rebutted, there is a preponderance of the evidence that he is a serious flight risk, and clear and convincing evidence that he is a danger to the community. Therefore, Jose Rubio is ORDERED DETAINED.

9. When a motion for pretrial detention is made, the Court engages a two-step analysis: first, the judicial officer determines whether one of six conditions exists for considering a defendant for pretrial detention; second, after a hearing, the Court determines whether the standard for pretrial detention is met. *United States v. Friedman*, 837 F.2d 48, 49 (2nd Cir. 1988).

A defendant may be considered for pretrial detention in only six circumstances: when a case involves one of either four types of offenses or two types of risks. A defendant is eligible for detention upon motion by the United States in cases involving (1) a crime of violence, (2) an offense with a maximum punishment of life imprisonment or death, (3) specified drug offenses carrying a maximum term of imprisonment of ten years or more, or (4) any felony where the defendant has two or more federal convictions for the above offenses or state convictions for identical offenses, 18 U.S.C. § 3142(f)(1), or, upon motion by the United States or the Court *sua sponte*, in cases involving (5) a serious risk that the person will flee, or (6) a serious risk that the defendant will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, a prospective witness or juror. *Id.*, § 3142(f)(2); *United States v. Sloan*, 820 F.Supp. 1133, 1135-36 (S.D. Ind. 1993). The existence of any of these six conditions triggers the detention hearing which is a prerequisite for an order of pretrial detention. 18 U.S.C. § 3142(e). The judicial officer determines the existence of these conditions by a preponderance of the evidence. *Friedman*, 837 F.2d at 49. See *United States v. DeBeir*, 16 F.Supp.2d 592, 595 (D. Md. 1998) (serious risk of flight); *United States v. Carter*, 996 F.Supp. 260, 265 (W.D. N.Y. 1998) (same). In this case, the United States moves for detention pursuant to § 3142(f)(1)(A), (B), (C), and (f)(2)(A) and the Court has found these bases exist.

Once it is determined that a defendant qualifies under any of the six conditions of

§ 3142(f), the court may order a defendant detained before trial if the judicial officer finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community. 18 U.S.C. § 3142(e). Detention may be based on a showing of either dangerousness or risk of flight; proof of both is not required. *United States v. Fortna*, 769 F.2d 243, 249 (5th Cir. 1985). With respect to reasonably assuring the appearance of the defendant, the United States bears the burden of proof by a preponderance of the evidence. *United States v. Portes*, 786 F.2d 758, 765 (7th Cir. 1985); *United States v. Himler*, 797 F.2d 156, 161 (3rd Cir. 1986); *United States v. Vortis*, 785 F.2d 327, 328-29 (D.C. Cir.), *cert. denied*, 479 U.S. 841, 107 S.Ct. 148, 93 L.Ed.2d 89 (1986); *Fortna*, 769 F.2d at 250; *United States v. Chimurenga*, 760 F.2d 400, 405-06 (2nd Cir. 1985); *United States v. Orta*, 760 F.2d 887, 891 & n. 20 (8th Cir. 1985); *United States v. Leibowitz*, 652 F.Supp. 591, 596 (N.D. Ind. 1987). With respect to reasonably assuring the safety of any other person and the community, the United States bears the burden of proving its allegations by clear and convincing evidence. 18 U.S.C. § 3142(f); *United States v. Salerno*, 481 U.S. 739, 742, 107 S.Ct. 2095, 2099, 95 L.Ed.2d 697 (1987); *Portes*, 786 F.2d at 764; *Orta*, 760 F.2d at 891 & n. 18; *Leibowitz*, 652 F.Supp. at 596; *United States v. Knight*, 636 F.Supp. 1462, 1465 (S.D. Fla. 1986). Clear and convincing evidence is something more than a preponderance of the evidence but less than proof beyond a reasonable doubt. *Addington v. Texas*, 441 U.S. 418, 431-33, 99 S.Ct. 1804, 1812-13, 60 L.Ed.2d 323 (1979). The standard for pretrial detention is “reasonable assurance”; a court may not order pretrial detention because there is no condition or combination

of conditions which would *guarantee* the defendant's appearance or the safety of the community. *Portes*, 786 F.2d at 764 n. 7; *Fortna*, 769 F.2d at 250; *Orta*, 760 F.2d at 891-92.

10. A rebuttable presumption that no condition or combination of conditions will reasonably assure the defendant's appearance or the safety of any other person and the community arises when the judicial officer finds that there is probable cause to believe that the defendant committed an offense under (1) the Controlled Substances Act, 21 U.S.C. § 801 *et seq.*; the Controlled Substances Import and Export Act, 21 U.S.C. § 951 *et seq.*, or the Maritime Drug Law Enforcement Act, 46 U.S.C. App. § 1901 *et seq.*, for which a maximum term of imprisonment of ten years is prescribed; (2) 18 U.S.C. § 924(c); (3) 18 U.S.C. § 956(a); or (4) 18 U.S.C. § 2332b. 18 U.S.C. § 3142(e).

This presumption creates a burden of production upon a defendant, not a burden of persuasion: the defendant must produce a basis for believing that he will appear as required and will not pose a danger to the community. Although most rebuttable presumptions disappear when any evidence is presented in opposition, a § 3142(e) presumption is not such a "bursting bubble". *Portes*, 786 F.2d at 765; *United States v. Jessup*, 757 F.2d 378, 383 (1st Cir. 1985). Therefore, when a defendant has rebutted a presumption by producing some evidence contrary to it, a judge should still give weight to Congress' finding and direction that repeat offenders involved in crimes of violence or drug trafficking, as a general rule, pose special risks of flight and dangers to the community. *United States v. Dominguez*, 783 F.2d 702, 707 (7th Cir. 1986) (presumption of dangerousness); *United States v. Diaz*, 777 F.2d 1236, 1238 (7th Cir. 1985); *Jessup*, 757 F.2d at 383.

The Court has found the presumptions arise in this case and have not been rebutted.

11. If Mr. Rubio rebutted the presumptions, the Court would consider the evidence

presented on the issue of release or detention weighed in accordance with the factors set forth in 18 U.S.C. § 3142(g) and the legal standards set forth above. Among the factors considered both on the issue of flight and dangerousness to the community are the defendant's character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearances at court proceedings. 18 U.S.C. § 3142(g)(3)(A). The presence of community ties and related ties have been found to have no correlation with the issue of safety of the community. *United States v. Delker*, 757 F.2d 1390, 1396 (3rd Cir. 1985); S.Rep. No. 98-225, 98th Cong., 1st Sess. at 24, *reprinted in* 1984 U.S. Code Cong. & Admin. News 3182, 3207-08.

12. In this regard, the Court finds and concludes that the evidence in this case demonstrates the following:

a. As set forth above, and as contained in the allegations of the indictment, and the evidence presented during the pre-trial detention hearing, the evidence demonstrates a strong probability of conviction, the defendant and his co-defendants having been observed on various occasions during the course of the charged conspiracy while in the process of distributing heroin as evidenced through electronically intercepted wire communications.

b. The mandatory minimum sentence of ten (10) years, coupled with a maximum possible sentence of life imprisonment, establishes the defendant is a risk of flight.

When accompanied with the fact that the defendant has no ties to the Southern District of Indiana, and purports to be in need of a translator although claiming to have been born in California and a life long resident of the United States, the unreasonable risk of flight is

established by a preponderance of evidence.

c. The evidence indicating the defendant engaged in incipient criminal conduct, which is capable of continuing, establishes the danger to the community if the defendant were to be released. The danger to the community and other persons is further exacerbated by the fact that the defendant is currently serving a suspended sentence for conduct committed as a single act in the charged conspiracy which involves multiple states, a large quantity of heroin which is a highly addictive narcotic controlled substance, and a very large number of participants not all of whom are in custody.

d. All of these facts considered, clearly and convincingly demonstrates there is no condition or combination of conditions which could reasonably assure the safety of the community or any other person or the appearance of the defendant as required.

The Court having weighed the evidence regarding the factors found in 18 U.S.C. § 3142(g), and based upon the totality of evidence set forth above, concludes that if the defendant had rebutted the presumptions in favor of detention, he nevertheless, would be detained, because he is, by a preponderance of the evidence a serious risk of flight, and by clear and convincing evidence a danger to the community.

WHEREFORE, Jose Rubio is hereby committed to the custody of the Attorney General or his designated representative for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal. He shall be afforded a reasonable opportunity for private consultation with defense counsel. Upon order of this Court or on request of an attorney for the government, the person in charge of the corrections facility shall deliver the defendant to the United States Marshal for the purpose of an appearance in connection with the Court proceeding.

Dated this _____ day of _____, 2006.

Kennard P. Foster
United States Magistrate Judge
United States District Court

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